United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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P/s

No. 77-7109

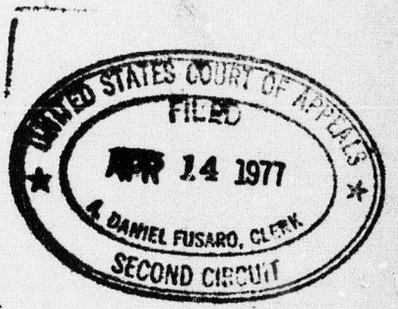
In the

United States Court of Appeals

For the Second Circuit

DAVID BECKER and MARGARET B. LEDDER, *Plaintiffs-Appellants,* *vs.* SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION, *Defendants-Appellees.*	Appeal from the United States District Court for the Southern District of New York. — Honorable **Constance Baker Motley,** Judge Presiding.

BRIEF OF PLAINTIFFS-APPELLANTS.



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DAVID BECKER and MARGARET B. LEDDER, Plaintiffs-Appellants, vs. SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION, Defendants-Appellees.	Appeal from the United States District Court for the Southern District of New York. Honorable Constance Baker Motley Judge Presiding

BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in denying plaintiffs' motion for class action determination on the ground that plaintiffs' claim was included in the claims asserted in another pending class action attacking an unrelated transaction occurring 18 months subsequent to the transaction challenged in the present suit.

2. Whether the trial court erred in denying plaintiffs' motion for class action determination on the ground that plaintiffs were not members of the class they sought to represent.

3. Whether the trial court erred in granting defendants' motion for summary judgment on the grounds of mootness.

PRELIMINARY STATEMENT

The decisions appealed from were rendered by Judge Constance Baker Motley. None of the decisions are reported.

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs, former shareholders of BHM Industries, Inc., sued defendants Schenley Industries, Inc. (BHM's controlling stockholder), Glen Alden Corporation (Schenley's parent), and Rapid-American Corporation (Glen Alden's parent), under Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 and Rule 10b-5 and 14a-9 thereunder.

Plaintiffs' complaint*/ charged that the BHM proxy

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*/ The action was originally begun in the United States District Court for the Northern District of the United States, Eastern Division. It was transferred by that court on May 17, 1972 to the Southern District of New York on motion of defendants under 28 U.S.C. § 1404(a) prior to the filing by plaintiffs of their motion for class action determination and prior to the commencement of any discovery.

statement distributed to its minority shareholders in connection with a proposed merger of BHM into Schenley in November, 1969, was false and misleading in that it misrepresented the true value of BHM and therefore the value of the stock owned by its minority shareholders.

Specifically, plaintiffs charged that the value ascribed to BHM for purposes of the merger was $116,000,000, including both BHM's wholly owned subsidiary, Buckingham Corporation, and $34,000,000 in cash. Plaintiffs further charged that 10 months after the merger Schenley agreed to sell Buckingham alone to Northwest Industries for $120,000,000, thus realizing a profit of $38,000,000 on the merger transaction. (A. 114); solely to the benefit of Schenley and to the exclusion of BHM's minority shareholders.

Plaintiffs sued on their own behalf and on behalf of a class consisting of all minority stockholders of BHM at the time the fraudulent proxy statement was issued. Plaintiffs sought damages in the aggregate amount of $18,000,000, being the difference between the value which they received for their minority interest in the merger and the true value thereof. (A. 114).

The litigation never progressed beyond the discovery stage. Despite the prima facie case developed by plaintiffs in discovery, and spread of record in affidavits of plaintiffs' counsel, the case was dismissed on the ground of mootness

after denial of class action status and after tender by defendant to plaintiffs of their individual damages of approximately $4,600.00.

The critical order appealed from herein, the trial court's denial of class action status, was obtained by defendants who capitalized on the existence of a wholly separate class action challenging an entirely unrelated merger between Schenley and its parent, Glen Alden, in June, 1971, a year and a half after the BHM-Schenley merger. Defendants convinced the trial court that the claim for relief asserted by plaintiffs herein was also included in the claims for relief asserted in the other class action. This conclusion, as plaintiffs hereinafter will show, was the result of serious confusion between the present case and the other class action, a confusion in large part engendered by defendants, which has resulted in a dismissal of plaintiffs' claims without any trial on the merits of the serious fraud charges alleged in the complaint and established by plaintiffs' discovery.

B. Proceedings Below

Plaintiffs' initial motion for class action determination was denied by Judge Charles H. Tenney on October 15, 1972, with leave to renew after preliminary discovery.

(A. 164)*/

Plaintiffs promptly engaged in substantial discovery uncovering numerous material facts which had either been concealed or misrepresented and which rendered the BHM proxy statement at least prima facie false and fraudulent. (See Statement of Facts, infra, pp. 10-12).

Plaintiffs then amended their complaint to plead the additional facts developed on discovery and renewed their class action motion. (A. 110, 168)

On September 19, 1975, Judge Motley, to whom the case had been reassigned, entered her memorandum opinion and order denying class action certification. (A. 246). Her opinion and order misconstrued and incorrectly defined the class which plaintiffs sought to represent and concluded that plaintiffs were not members thereof and therefore had no standing to maintain the action as a class action. (A. 248). As a further ground, Judge Motley held that the claims asserted by plaintiffs were also asserted in the five consolidated

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*/ Judge Tenney relied on Dolgow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1966), which held that an action will not be permitted to proceed as a class action unless the plaintiffs first establish "a substantial possibility that they will prevail on the merits." Dolgow was disapproved by the United States Supreme Court in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

class actions entitled Cole v. Schenley Industries, Inc., 71 Div. 1028, then pending in the District Court before Judge Owen. Accordingly, Judge Motley concluded that the requirement of Rule 23(b)(3) F.R.Civ.P. that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" was not met because of the pendency of Cole v. Schenley. (A. 250)

Thereafter, on October 6, 1975 defendants tendered to plaintiffs the amount of their individual damages and moved for summary judgment on the ground of mootness. (A. 252) Plaintiffs filed their cross-motion pursuant to Rule 23(c)(1) F.R.Civ.P. to alter the court's prior order of September 19, 1975 denying class action status. (A. 280). On January 18, 1977 the trial court denied plaintiffs' cross-motion and granted defendants' motion for summary judgment. (A. 294, 295) On January 24, 1977, the trial court entered its judgment order dismissing plaintiffs' action. (A. 296). Defendants' tender of plaintiffs' individual damages was rejected. (A. 297)

STATEMENT OF FACTS

Plaintiffs commenced this action on December 28, 1971 in the United States District Court for the Northern District of Illinois, Eastern Division. (A. 1). On

May 17, 1972, on motion of defendants pursuant to 28 U.S.C. § 1404(a), the case was transferred to the United States District Court for the Southern District of New York.

On July 18, 1972, plaintiffs filed their initial motion for class action determination. (A. 126). As defined therein, the class for which plaintiff sought certification consisted of "all shareholders of BHM other than Schenley at the time the proxy statement was issued and the merger consummated." This definition of the class remained the same in plaintiffs' renewed motions for class action certification. (A. 170). As the plaintiffs made clear, the class was defined to include all of the BHM minority shareholders irrespective of whether they subsequently retained or sold the $1.40 Schenley preferred stock which they received in the BHM-Schenley merger. (See, e.g., Aff. of Leonard Marks, A. 287).

The claim for relief which plaintiffs asserted on behalf of their class, both in their original and amended complaints, and now assert in this Court, is succinctly stated as follows: that the BHM proxy statement distributed to BHM minority shareholders on November 17, 1969, violated Sections 10(b) and 14(a) of the 1934 Act and Rules 10b-5 and 14a-9 thereunder in that the BHM minority stockholders were deceived as to the true value of their shares and as a result

thereof were damaged in the aggregate amount of the difference between what they received in the merger and the true value of their shares. (Compl., A. 8, 9; Amended Comp. A. 114, 117.

When plaintiffs commenced their action there were then pending in the Southern District of New York five consolidated cases under the caption Cole, et al. v. Schenley Industries, Inc., et al., 71 Civ. 1028, etc. (A. 299). These cases, brought by shareholders of Schenley, challenged the merger of Schenley into a wholly owned subsidiary of Glen Alden on June 17, 1971. On May 25, 1973, Judge Weinfeld certified two classes in Cole which he defined as follows:

> "Class I will be deemed to be limited (as is Class II) to holders of Schenley as of February 24, 1971 -- the only difference between Classes I and II being that the members of Class II continued to hold their shares until the effective date of the merger while the members of Class I elected to sell their shares prior to that date." (A. 372).

Approximately two-thirds of the classes defined by Judge Weinfeld were later found by Judge Owen to consist of persons who held $1.40 Schenley preferred stock which had been issued in the 1969 BHM-Schenley merger.*/ (A.

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*/ As Judge Owen found, the $1.40 Schenley preferred stock was traded on the New York Stock Exchange up to the date of the Schenley-Glen Alden merger. (A. 486). There was no finding by Judge Owen that those persons who held Schenley

(cont'd on p. 9)

When Judge Weinfeld granted class action certification he defined the claim in Cole as follows:

> "This claim is based upon allegations that the Schenley proxy statement of May 21, 1971 and defendants' course of conduct between September, 1968 and June, 1971 involved violations of Sections 10(b) and 14(a) of the Securities Exchange Act of 1934. It is alleged that Glen Alden intentionally depressed the market value of Schenley from the time of Glen Alden's purchase of an 86% interest in Schenley in 1968 until the 1971 merger announcement. A reduced conversion rate for the minority shareholders of Schenley is said to have resulted from this alleged conduct by defendants." (A. 371).

After the trial of the Cole case, and with the benefit the pre-trial order, Judge Owen defined the claim in that case as follows:

> "This is an action brought on behalf of former shareholders of Schenley Industries, Inc. ('Schenley') with respect to the merger of June 17, 1971 whereby Schenley became a wholly owned subsidiary of Glen Alden Corporation ('Glen Alden'). The main attack of the plaintiffs is upon the proxy statement of May 21, 1971, issued in connection with the upcoming merger, which is alleged to have been materially false and misleading.
>
> The plaintiffs' case basically is founded upon a single fact nucleus, to wit, that Schenley possessed large amounts of what

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*/ (cont'd from page 8)

preferred stock at the time of the Schenley-Glen Alden merger were identical to those persons who had originally received the Schenley preferred in the BHM-Schenley merger 18 months before. (Judge Owen refers to Buckingham Corporation, in the passage cited, rather than BHM. At the time of the BHM-Schenley merger, Buckingham was a wholly owned subsidiary of BHM. It was BHM, not Buckingham, which was merged into Schenley, in December, 1969).

> plaintiffs would define and would require management to define as 'surplus' or 'excess' cash; that this 'information' (or 'definition') was of importance to the shareholders and that the proxy statement failed to make adequate disclosure about such 'excess' cash.
>
> * * *
>
> What plaintiffs' claim comes down to in the final analysis is whether or not Schenley was required to characterize certain facts in a particular way, notwithstanding that they were otherwise essentially disclosed in the [June 17, 1971] proxy statement." (A. 486).

In his opinion of November 24, 1976, after trial of Cole, Judge Owen found that the 1971 proxy statement issued in connection with the Glen Alden merger fully disclosed all of the facts claimed to have been concealed or misrepresented. Accordingly, plaintiffs' claims in that case were dismissed. (A. 487-489).

In the present case, plaintiffs' initial class action motion was denied by Judge Tenney on October 15, 1972 with leave to renew after preliminary discovery. (A. 164).

Upon discovery plaintiffs developed a prima facie case that the BHM proxy statement was fraudulent. The facts established were:

1. The exchange ratio was based in part on the opinion of White, Weld & Company that said ratio was fair because BHM's minority shareholders would be receiving a

premium of approximately 14% over market price. However, by the time the proxy statement was issued to the BHM minority shareholders, no such premium existed. The proxy statement concealed these material facts. (A. 179-82, 211-16)

2. On July 24, 1969, the board of directors of Schenley adopted a resolution determining that the value of the minority interest in BHM was $68,570,111, $14 million more than the minority shareholders received in the merger. This fact was concealed in the proxy statement. (A. 182-83)

3. While the proxy statement revealed in very guarded language the existence of an antitrust suit instituted by the United States against Schenley, and that, as a result thereof, Schenley might dispose of Buckingham (BHM's operating subsidiary), the proxy statement concealed the fact that the relief sought by the government was divestiture of Buckingham, and concealed the fact that Schenley had formally proposed to the Government that it would enter into a consent decree requiring it to dispose of Buckingham not later than mid-1972. (A. 183-84). In September, 1969, two months before the proxy statement was issued to BHM minority stockholders, Schenley issued a formal proposed consent decree to the Antitrust Department which absolutely obligated Schenley to divest itself of Buckingham. (A. 183).

4. The proxy statement concealed the fact that several months prior to its issuance, Schenley had discussed the sale of Buckingham with Northwest Industries (its ultimate purchaser) and had advised Northwest Industries that the sale price for Buckingham would be $180,000,000. (A. 185-89, 216-17).

5. While the proxy statement disclosed that Loeb Rhoades & Co., an investment banking firm, had given Schenley an opinion that the merger terms were fair, it concealed the fact that Loeb Rhoades had been advised by Schenley that Schenley intended to sell Buckingham as soon as possible after the merger and that Schenley believed that Buckingham alone was worth $150,000,000. (A.207-11). The proxy statement disclosed only that Schenley might at some later date sell Buckingham, and concealed Schenley's opinion of the value of Buckingham. (A. 17).

On August 22, 1973, having completed discovery in accordance with Judge Tenney's order, plaintiffs renewed their class action motion. (A. 168). However, since plaintiffs were permitted by the court to obtain further discovery theretofore resisted by defendants, plaintiffs withdrew their renewed motion and completed discovery. The renewed motion was then resubmitted in March, 1974. (A. 202). All of the facts developed on discovery were spread of record in support of

plaintiffs' renewed motion for class action determination. (A. 168 et seq., 204 et seq.).

As heretofore noted, on September 19, 1975, Judge Motley denied plaintiffs' renewed motion for class action determination.

On January 18, 1977, Judge Motley denied plaintiffs' cross-motion to alter her prior denial of class action certification, relying on the reasons set forth in her earlier ruling of September 19, 1975. (A. 294). On that same date she granted defendants' motion for summary judgment on the ground of mootness. (A. 295). On January 24, 1977 the trial court entered its judgment order dismissing plaintiffs' action. (A. 296).

On January 20, 1977, plaintiffs' counsel wrote to defendants' counsel rejecting defendants' tender to plaintiffs of their individual damages. (A. 297).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR CLASS ACTION DETERMINATION

A. The Trial Court's Holding That Plaintiffs' Claim Was Included In The Claims Asserted In Cole v. Schenley Is Refuted By A Comparison Of The Two Cases.

The trial court's memorandum opinion denying plaintiffs' motion for class action determination rested on two grounds: first, that plaintiffs were not members of the class they sought to represent; and second, that, since plaintiffs' claim was included in the claims asserted in Cole v. Schenley, in which class action status had been granted, plaintiffs failed to meet the requirement of Rule 23(b)(3) that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." (A. 250) We discuss the second ground first.

Plaintiffs' action arose out of and was directed against the merger of BHM into Schenley in December, 1969. At the time of that merger plaintiffs were minority shareholders of BHM. The complaint and amended complaint charged that the proxy statement issued in connection with that merger was false and misleading in violation of Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 in that it misrepresented

the true value of the minority shareholders' interest in BHM.

Plaintiffs brought their action on behalf of themselves and all other minority shareholders of BHM at the time of the merger and claimed damages in the aggregate amount of $18,000,000, being the difference between the value of the Schenley securities received in the 1969 merger and the true value of the 47.3% minority interest in BHM.

By contrast, Cole v. Schenley involved an entirely different transaction occurring a year and a half later: the 1971 merger of Schenley into a wholly owned subsidiary of its parent, Glen Alden. The plaintiffs in Cole were minority shareholders of Schenley, representing themselves and all minority shareholders of Schenley as of February 24, 1971. As Judges Weinfeld and Owen both found, the claim in Cole was based upon the Schenley proxy statement of May 21, 1971, issued in connection with that merger, and the charge that that proxy statement was false and misleading because it understated the value of the minority interest in Schenley and resulted in a "reduced conversion rate for the minority shareholders of Schenley ...." (A. 370).

The finding of the trial court in the present case that plaintiff's claim here was included in the Cole action was based expressly on paragraphs 22(b) and 32(b) of the amended complaint in Cole. (A. 249). However, a reading of those

paragraphs in the context of the 67 page amended complaint in Cole clearly demonstrates that they did not and could not have asserted the claim asserted by plaintiffs in the present case.

To do justice to the parties in the present controversy, it is essential to parse out the legal theories under which the Cole parties sought recovery on their claim.

The first theory was that Schenley and Glen Alden had engaged in a scheme to depress the market value of Schenley's common and preferred stock by, inter alia, deceiving the public respecting the value of Schenley's assets, particularly its cash, and cash equivalents (assets which the Cole plaintiffs claimed could easily have been liquidated and were not necessary for Schenley's business). It is in this context that the Cole plaintiffs alleged that Schenley, in the 1969 BHM-Schenley merger, had concealed from Schenley stockholders the true value of BHM's assets, including the liquidation value of BHM's principal subsidiary, Buckingham Corporation. However, there is no charge that, at the time of the 1971 Schenley-Glen Alden merger the true value of BHM's assets was still concealed.

The allegations contained in paragraph 22(b) of the Cole complaint, to which Judge Motley referred, are expressly incorporated within this market-rigging theory by the allegations

of the immediately preceding paragraph. That paragraph (paragraph 21) squarely alleges

> "those market prices [prices for Schenley common and Schenley preferred stock] had been artfully depressed during that entire period, as well as prior thereto by the concealment of the facts alleged in paragraph 16 through 20 above and in paragraph 22 below." (Emphasis added). (A. 321-22).

It is therefore plain that the Cole plaintiffs did not intend to assert a claim for relief for the BHM minority stockholders at the time of the BHM-Schenley merger. This, in fact, was precisely what Judges Owen and Weinfeld concluded in their respective analyses of the Cole complaint excerpted above (pp. 8-10, supra). Both courts expressly noted that one of the theories of recovery was a scheme to depress the value of Schenley stock prior to the 1971 Schenley-Glen Alden merger.

An additional theory of recovery on the Cole claim, that the Schenley minority interest was fraudulently undervalued in the Schenley-Glen Alden merger, is set forth in paragraph 32 in the Cole complaint. This theory asserts that the unfair conversion ratio for Schenley minority stock in the Glen Alden merger was part of a three step plan conceived in early 1968 which had, as its objective the appropriation by Glen Alden of all of the shares, assets, good will and business of Schenley and its subsidiary, at prices substantially below their fair value at the expense of the minority stockholders of Schenley and Buckingham...." (A. 331). It is, again

expressly within this context, that the Cole plaintiffs plead that there was "concealment of material facts which depressed the market prices of Buckingham shares in 1969 . . . by means of an untrue and deceptively misleading proxy statement of Schenley dated November 17, 1969." And again, there is no allegation that the material facts relative to the value of Buckingham (BHM) concealed in 1969 were still concealed at the time of the 1971 Schenley-Glen Alden merger. These allegations of paragraph 32(b), upon which Judge Motley also relied, did not assert a claim for recovery on behalf of the minority shareholders of BHM at the time of the November 17, 1969 BHM proxy statement, but rather, were descriptive allegations of past events supporting the theory that at the time of the Glen Alden-Schenley merger in 1971, Glen Alden was consummating a fraudulent scheme, the origins of which began in 1968.

It should be reiterated that neither Judge Owen nor Judge Weinfeld ever interpreted the allegations of paragraph 32(b) as stating a separate claim on behalf of the minority shareholders of BHM, but rather they read them as what they were in fact: assertions by the Cole plaintiffs that, prior to the to the Glen Alden-Schenley merger, there had been "inadequate disclosure" to Schenley stockholders of the Schenley gain from the Schenley-BHM merger as part of the scheme to depress the price of Schenley stock in the 1971 merger. But there was no

claim in Cole that this "inadequate disclosure" continued to the time of the 1971 merger. Judge Weinfeld stated succinctly the core of the claim of which these factual allegations were but a part.

> "At the core of the wrongs alleged on behalf of each of the classes is the claimed scheme, said to have been carried out over a three-year period culminating with the alleged false and misleading proxy statement, to depress the market in Schenley shares by concealing Schenley's true financial condition, in order to enable Glen Alden to acquire the minority interest in Schenley for an inadequate consideration." (A. 373).

It is further significant that in defining the class in Cole, Judge Weinfeld made no effort to distinguish and create a sub-class consisting of former minority shareholders of BHM suing for damages resulting from the BHM-Schenley merger in 1969. If any such claim had been asserted on behalf of this class in Cole, creation of a sub-class consisting of such persons would have been necessary since it would have been manifest that their claim was antagonistic to the other Schenley stockholders. Any recovery by the sub-class would have been paid out of the assets of Schenley, to the detriment of Schenley stockholders other than former BHM stockholders.

In its reliance on paragraphs 22(b) and 32(b), the trial court overlooked a more important part of the Cole complaint which contained an unequivocal admission that, by the

time of the Schenley-Glen Alden merger in 1971, the members of the Cole class knew the ultimate fact which plaintiffs and the BHM minority in the present case allege was concealed from them 18 months before: that Buckingham alone had a market value which exceeded the value which Schenley had ascribed to all of BHM for purposes of the 1969 merger. This admission, contained in paragraph 23(a) of the Cole complaint (A.323). necessarily excluded from the Cole case the claim of plaintiffs in the present case. This conclusion is inescapable since the nub of plaintiffs' claim in the present case is that Schenley concealed from BHM's minority (a) its intention to sell Buckingham after the merger; (b) its legal obligation to do so under the antitrust consent decree; (c) the very high valuation it placed on Buckingham (the asking price it transmitted to Northwest Industries, the ultimate buyer), and (d) in light of the price Schenley expected to obtain for Buckingham shortly after the BHM merger, that the merger ratio was grossly fraudulent as to BHM's minority. By the time of the Schenley-Glen Alden merger in 1971, no such claim could have been asserted by Schenley stockholders.

In sum, at least on the basis of the facts alleged, and theories asserted in the consolidated Cole complaint, there was no dispute that, at the time of the 1971 merger, the minority shareholders of Schenley had been fully apprised

of the facts concealed from the BHM minority in 1969.

The pretrial order in Cole, which, under established law, supersedes the complaint in its entirety,*/ further demonstrates that the claim asserted in the present case on behalf of the BHM minority was in no sense litigated at the trial of the Cole case. The statements of disputed facts, the statements of contentions as to liability and damages, and the statements of issues presented by the parties in the final pretrial order narrowed the area of dispute to whether the proxy statement issued in connection with the 1971 Schenley-Glen Alden merger fairly and adequately disclosed the amount of Schenley's excess or surplus cash, and whether that amount had been adequately disclosed in the proxy statement. The extent to which the focus was exclusively on disclosure by Schenley of the value of Schenley's assets and cash surplus in 1971 (on the theory of market price depression prior to the merger) is illustrated by certain salient features of the pre-trial order:

(a) Cole plaintiffs' exhibits relied on Schenley's proxy statement and financial dis-

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*/ Case v. Abrams, 352 F.2d 193, 195 (10th Cir. 1965); Rompe v. Yablon, 277 F.Supp. 662 (S.D.N.Y. 1967); 3 Moore, Fed. Practice, ¶ 16.19.

losure documents nearly exclusively, and particularly in connection with the 1969 BHM-Schenley merger (see Plaintiffs' Exhibit 2, A. 471; and see balance of Exhibits A-471-478), and not BHM's proxy statement or financials;

(b) In setting forth the issues which plaintiffs contended should be tried (A. 482-484), the plaintiffs stated no issues whatsoever related to the BHM-Schenley merger of 1969;

(c) In stating the issues which they contended should be tried, defendants likewise confined the issues to the proxy statement relating to the Schenley-Glen Alden merger of 1971. No mention was made of the BHM-Schenley merger of 1969. (A. 484-85).

It is true that the Cole plaintiffs also included much the same allegations as appear in their amended complaint in their statement of contentions in the pretrial order. Indeed, defendants attempted to make much of this fact before Judge Motley. Nevertheless, it is equally true that these references to the BHM-Schenley merger in plaintiffs' statement of contentions did not, at least, in the view of the Cole plaintiffs, raise any issue for trial on the claim of the BHM minority that it was defrauded in the 1969 merger.

As previously noted, neither the plaintiffs nor the defendants included this issue in their statement of issues for trial.

Furthermore, if the references to the 1969 BHM-Schenley merger in the pretrial order are analyzed on their own terms, it is also clear that they are not intended and could not in so many words have included plaintiffs' claims in the present case. The Cole plaintiffs' references to the BHM-Schenley merger (all of which appear at pp. A. 441-443) are merely part of the theory that the 1969 proxy statement was utilized by Glen Alden to "put itself in a position to force the $1.40 preferred shareholders [of Schenley] to sell their shares to Glen Alden at a later date." (A. 441). Following this blanket assertion, there are a catalog of facts allegedly concealed in the 1969 proxy statement from Schenley stockholders all relating to Schenley's cash or cash sources. But none of these facts in any way could have worked a fraud on BHM's minority since these facts had nothing to do with the undervaluation of BHM stock. Quite the contrary, they dealt exclusively with the value of Schenley stock, and if true, would have meant only that Schenley stock was undervalued in the 1969 BHM-Schenley merger.

Finally, while the Cole plaintiffs also refer to the fact that, after the BHM merger into Schenley, Schenley would

be able to transfer $32,000,000 of BHM's cash to itself, there is no contention that this fact was concealed from anyone, nor could there have been, since the existence of this cash was plainly disclosed in the 1969 Schenley proxy statement. */

For the foregoing reasons, all of which emerge after the necessary analytical comparison of the two complaints, and a detailed examination of the final pretrial order in Cole, plaintiffs submit that the trial court was in error in holding that the plaintiffs' claim in the present case was included in the claims asserted in Cole v. Schenley.

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*/ At this point in Cole plaintiffs' contentions in the pretrial order, there also appears a charge that the 1969 proxy statement misrepresented the voting rights of the 1.40 Schenley preferred, and that their conversion rights could be altered by a majority of the Schenley stockholders in the merger. (A. 443). It is obvious, however, that this contention, even if true, has nothing whatever to do with any claim that the minority interest of BHM was undervalued, which is the gravamen of plaintiffs' claim in the present case. Indeed, the relief which the Cole plaintiffs would obtain, had they prevailed on this contention, would not have been an adjustment in the BHM-Schenley conversion ratio, or damages as are sought in the present case, but solely equitable relief protecting the Schenley 1.40 preferred stockholders against alteration or elimination of their conversion rights.

B. No Relief Was Sought In Cole On Behalf Of The BHM Minority For Damages Suffered In The 1969 Merger; Nor Was The Relief Sought In Cole And In The Present Case Mutually Exclusive.

The trial court's error in concluding that the present case and the class action in Cole v. Schenley are duplicative; that there was a likelihood of inconsistent outcomes between the cases; and that the interests of the member of the class represented by plaintiffs in the present case were adequately protected in the Cole litigation, (A. 250) is further demonstrated by an analysis of the relief sought in the two cases.

In the present case the relief sought was limited to damages suffered by former minority shareholders of BHM in the merger of their corporation into Schenley in 1969. By contrast in Cole, relief of two kinds was sought: (1) equitable relief designed to void the Schenley-Glen Alden merger of 1971, and to require Glen Alden and Rapid American to account to Schenley and the Cole class of Schenley shareholders "for the gains and profits that were realized by them at the expense of Schenley and members of the class, on whose behalf this action was brought . . ." (A. 364); and (2) damages to compensate Schenley, and members of the class of Schenley shareholders on whose behalf the Cole action was brought, for Glen Alden's unlawful conduct in connection with the 1971 merger. (A.363-365).

It is obvious without extended argument that, if the equitable relief sought in Cole had been granted in full, such relief in no way could have remedied the fraud committed against the BHM stockholders in the 1969 BHM-Schenley merger. Likewise, had the court in Cole awarded the money damages sought there to the minority shareholders of Schenley for the injury suffered by them in the Schenley-Glen Alden merger in 1971, such damages would not have compensated the BHM minority for the injury suffered by them in the 1969 merger. Moreover, any damages recovered in Cole would be unavailable to those persons who were members of the BHM minority but who were not members of the Cole class, because they had sold their Schenley preferred stock prior to February 24, 1971,*/ (the critical date for inclusion in the Cole class, as defined by Judge Weinfeld). Thus relief granted in Cole could not have been inconsistent with or duplicative of relief sought in the present case. The claims and damages alleged in the two cases were separate and distinct and the relief sought was not mutually exclusive.

The fact that, if damages had been awarded in the Cole case, such damages would not have been duplicative

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*/ As demonstrated infra at pp. 29-32 , plaintiffs in the present cases had standing to represent those former BHM stockholders who did not retain their Schenley preferred stock received in the BHM-Schenley merger.

or mutually exclusive of any damages awarded in the present case, is easily illustrated. If we assume that the Cole action had resulted in an aggregate damage award fully compensating the Schenley minority for the undervaluation of their stock in the Schenley-Glen Alden merger, the members of the Schenley class who had previously been BHM minority shareholders would have their respective or individual damages calculated on the basis of the number of Schenley preferred shares which they had received in the the 1969 BHM-Schenley merger, without any adjustment for the fraud practiced upon them in that merger. Having received too few shares of Schenley preferred because of the undervaluation of their BHM stock in 1969, they would receive a proportionally smaller share of the damages awarded to the Cole class than they would have received if the present class action on their behalf had been permitted to proceed to judgment.

Conversely, if the parties in the present case had been permitted to proceed and had recovered the damages sought on behalf of their class of former minority shareholders of BHM, such recovery could in no way compensate them for the undervaluation of the Schenley preferred stock which they held on February 24, 1971 in connection with the Schenley-Glen Alden merger. Such compensation could only come from a damage action, such as Cole, directed at that merger. It is perhaps a truism,

albeit a necessary one, to state that the two mergers were entirely separate, unrelated transactions, not only in terms of time, but also in terms of constituent corporations, their respective financial conditions and the identity of their respective shareholders.

All of the foregoing analysis results in but another illustration of the fundamental error made by the trial court in reaching its conclusion that the claims asserted in Cole included the claim of plaintiffs in the present case. As a matter of law, where multiple claims are asserted, but the relief obtainable is not mutually exclusive, the claims are separate. Since recovery of damages in the present case, and recovery of damages in Cole, would not constitute double recovery on the part of former BHM minority shareholders who continued to hold their Schenley preferred stock until the Glen Alden merger, the claims of such persons are, as a matter of law, separate claims and not merely the same claim asserted under different legal theories. Reiser v. Baltimore & Ohio R.R., 224 F.2d 198,199 (2d Cir. 1955); Perma Research and Development Co. v. Singer Co., 410 F.2d 572 (2d Cir. 1969); Higgins v. Shenango Pottery Co., 256 F.2d 504 (3d Cir. 1958). With respect to former minority shareholders of BHM who had sold their Schenley preferred stock prior to February 24, 1971, double recovery was patently impossible. For the foregoing reasons, plaintiffs submit that the trial court's conclusion

that "the BHM-Schenley merger and proxy statement are in issue in Cole" (A. 249) is erroneous. */

C. The Trial Court's Holding, That Plaintiffs Had No Standing To Represent Former BHM Minority Stockholders Who Had Sold Their Schenley Preferred Stock Received In The BHM-Schenley Merger, Was Error.

The only other ground upon which the trial court denied plaintiffs' class action motion was that "in the court's view, plaintiffs do not appear to be members of the class which they purport to represent" (A. 248).

This conclusion was based upon a mistaken finding by the court that

> "The class which plaintiffs seek to represent is defined as those shareholders of BHM who, after exchange of BHM shares for Schenley stock,

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*/ Blecker v. Lazard Freres & Co., CCH F.2d L.Rep. ¶ 94,306 (S.D.N.Y. 1973) relied on by the trial court (A.250), is not in point. That decision involved two derivative cases in which "both the factual allegations, and the theories of recovery [were] virtually identical." (Id. at ¶ 95,032). For this reason, the trial court there stayed the later filed case. Assuming, contrary to fact, that the present case and the Cole litigation were as nearly identical as the two cases in question in Blecker, the trial court herein should properly have stayed the present case. Instead, it denied plaintiffs' class action motion and ordered the plaintiffs to prepare for an immediate trial (A. 251). In view of its reliance on Blecker, this ruling was anomalous.

> sold their Schenley preferred stock prior to February 24, 1971." (Id.)

Since, as the trial court noted, the plaintiffs were not themselves persons who sold their Schenley preferred stock, its holding that plaintiffs were not members of the class which they sought to represent would be correct only if its definition of plaintiffs' purported class were correct. It was not.

Consistently, since the commencement of the present action, plaintiffs have sought to represent one class, viz., all persons who were minority shareholders of BHM at the time of the BHM-Schenley merger in 1969 (supra, p.7). The trial court's statement of the class definition is inexplicable.

Given the correct definition of plaintiffs' class, there is no dispute that plaintiffs, as former minority shareholders of BHM in 1969, are members of the class they seek to represent and therefore have standing to maintain this class action.

The only two remaining issues, then, are:

(a) Can plaintiffs represent persons who retained their Schenley preferred stock obtained in the 1969 merger, as well as persons who sold such shares; and

(b) The subsidiary question, whether there is any conflict of interest between class members who sold and class members who retained their Schenley preferred stock.

The question whether a plaintiff challenging a merger may represent a class of persons which includes those who retained and those who sold the shares of the surviving corporation obtained in the merger is not a question of first impression in this circuit. It has squarely been resolved in favor of plaintiffs in the present case. Herbst v. ITT, 495 F.2d 1308 (2d Cir. 1974). In Herbst, this Court stated:

> "The complaint defined the class as all holders of Hartford common stock who exchanged their shares for ITT preferred, which clearly identifies class members. ITT claims that Herbst's claims are not typical, because she sold her ITT preferred in the same year that she received it. Therefore, the argument runs she cannot represent those who care about whether the exchange was tax-free. ITT also contends that Herbst cannot represent the large, tax-exempt, institutional shareholders. As noted above, all those who exchanged their shares would have benefited from a higher price. Under Herbst's claims all shareholders, large and small, tax-exempt or not, would benefit equally and so her claim is typical. Furthermore, we do not perceive any conflict of interest between those who have retained their ITT shares and those who have since sold them. The personal interest of those who still hold ITT stock in gaining more from the exchange than they did far outweighs their concern that any award could damage ITT. Herbst v. Able, 47 F.R.D. 11, 15 (S.D.N.Y. 1969)." (Id. at 95,687)

The foregoing language of the Court not only points out the primary error of the trial court in concluding that plaintiffs herein, who retained their Schenley preferred shares, lack standing to represent members of their class who sold such shares; but, it also disposes of the trial court's subsidiary conclusion that plaintiffs and members of their class who sold their Schenley preferred stock "may well have different if not adverse interests in the conduct of this litigation."

To the same effect: Federman v. Empire Fire and Marine Insurance Co., 19 F.R. Serv. 2d 480 (S.D.N.Y. 1974), where the court certified a class action on behalf of a class consisting of both sellers and nonsellers of securities issued pursuant to an allegedly false prospectus. In that case the trial court noted that, should any conflict later appear, it possessed the power to alter the class prior to decision on the merits to remedy the problem; and Handwerger v. Ginsberg, 19 F.R.Serv. 2d 1051 (S.D.N.Y. 1975) where the court rejected defendants' contention that plaintiff could not represent both holders and sellers of the securities in question, relying on Madovick v. Denison Mines, Limited, 63 F.R.D. 657 (S.D.N.Y. 1974).

Framed against a correct definition of the class represented by plaintiffs here, and based on the foregoing

authorities, the trial court's conclusion that plaintiffs had no standing to represent the class on whose behalf the present action was brought was erroneous.

II. PLAINTIFFS MET ALL OTHER REQUIREMENTS OF RULE 23 AND HAD NO LEGAL DUTY TO INTERVENE IN THE COLE CASE

In the court below, defendants made no other challenge to plaintiffs' right to represent a class of all members of the BHM minority in the 1969 merger. No question was raised on such issues as numerosity; common questions of law and fact; or adequacy of representation. If, as argued above, the trial court was in error in holding that plaintiffs' claims were not typical of their class, and in holding that the present class action was not superior to other available methods for the fair and efficient adjudication of the controversy (solely because the Cole case included plaintiffs' claims) then class action certification properly should have been granted.

As a final note, the trial court suggested that "if the plaintiffs considered their interest inadequately protected by the Cole litigation, as members of the Cole class, plaintiffs may apply to intervene in that case." (A. 250-251). However well intended the trial court's suggestion might have been, it confronted plaintiffs with an impossible dilemma.

On the one hand, an effort to intervene in Cole would have constituted an abandonment by plaintiffs of their right to maintain the present action as a class action independent of Cole, and a recognition, contrary to fact, that plaintiffs' claims were included in the Cole litigation. On the other hand, such application for intervention could not properly have been granted, because it would and could not have complied with the requirements of Rule 24, F.R.Civ. P.

Intervention as of right, pursuant to Rule 24(a) was not available. As hereinabove argued, disposition of the Cole case would not "as a practical matter impair or impede" plaintiffs' ability to recover on their claim against Schenley arising out of the 1969 Schenley-BHM merger.

Similarly, permissive intervention, pursuant to Rule 24(b) was also unavailable because plaintiffs' claim in the present case did not have a question of law or fact in common with the claim asserted by the plaintiffs in Cole. The analysis of plaintiffs' claim and that of the claim in Cole, as set forth in the preceding portions of this brief, show that the claims arose out of separate transactions a year and a half apart, involved different corporations,and were based on wholly separate and distinct operative facts. In addition, the claims for relief in the present case and in Cole, are neither mutually exclusive nor duplicative, nor could they have resulted in double recovery.

III. SINCE THE CLASS WHICH PLAINTIFFS SOUGHT TO REPRESENT SHOULD PROPERLY HAVE BEEN CERTIFIED BY THE TRIAL COURT, ITS JUDGMENT DISMISSING THE CASE ON THE GROUND OF MOOTNESS, AFTER TENDER OF PLAINTIFFS' INDIVIDUAL DAMAGES, WAS ERROR.

If, as argued above, the trial court erred in denying plaintiffs' motion for class action determination, then it must follow as a matter of law, that dismissal of plaintiffs' case on grounds of mootness after tender of plaintiffs' individual damages, was also error. Otherwise, the remedial purposes of Rule 23 could be nullified in any class action merely by tender to a plaintiff of the amount of his individual claim. Clearly had such a procedure been attempted prior to the trial court's ruling on plaintiffs' motion for class action determination, it would have been summarily rejected. If the trial court were in error in denying class action certification, then, a fortiori, dismissal of the class action upon payment to plaintiffs of their individual damages is also in error. Cf. Sosna v. Iowa, 419 U.S. 393, 399, 401 (1965).

C O N C L U S I O N

For the reasons hereinabove argued, plaintiffs respectfully urge the Court to:

(a) Reverse the judgment order entered January 24, 1977 dismissing the above entitled action;

(b) Reverse the trial court's orders of September 19, 1975 and January 14, 1977 denying plaintiffs' motions for class action certification; and

(c) Remand the case to the district court with directions to enter appropriate orders pursuant to Rule 23 determining that this case may be maintained as a class action on behalf of all minority shareholders of BHM Industries, Inc. at the time of the merger of said corporation into Schenley Industries, Inc.; and directing that the case proceed to trial on the merits.

Respectfully submitted,

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No. 77-7109

In The
United States Court of Appeals
For the Second Circuit

DAVID BECKER and MARGARET B. LEDDEP,	)	Appeal from the United States District Court for the Southern District of New York
Plaintiffs-Appellants,	)	
vs.	)	
SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION,	)	Honorable Constance Baker Motley, Judge Presiding
Defendants-Appellees.	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that the undersigned filed with the Clerk of the Court of Appeals for the Second Circuit a Statement of Errata in the above captioned case, a copy of which was heretofore served upon you.

EDWARD SLOVICK

One of the attorneys for
Plaintiffs-Appellants

CERTIFICE OF SERVICE

EDWARD SLOVICK hereby certifies that he caused copies of the foregoing Notice and Statement of Errata to be served upon the persons shown on the above Notice, by mailing same to them this 13th day of April, 1977.

No. 77-7109

In the
United States Court of Appeals
For the Second Circuit

DAVID BECKER and MARGARET B. LEDDER,	)	Appeal from the United States District Court for the Southern District of New York
Plaintiffs-Appellants,	)	
vs.	)	
SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION,	)	Honorable Constance Baker Motley, Judge Presiding
Defendants-Appellees.	)	

BRIEF OF PLAINTIFFS-APPELLANTS

ERRATA

Page 8 - Last line: Add (A. 487).

Page 31 - Delete last line of quote (Id. at 95,687)

Add (495 F.2d at 134)

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STATE OF ILLINOIS, }
COUNTY OF COOK. } ss. Lee Brashears being first duly

sworn, deposes and says that he served two copies of the Brief
and one copy of Joint Appendix (Volumes I & II)

in the above entitled cause, as per statute herein made and provided, on

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and also filed the required number of copies of the above with the
U. S. Court of Appeals, Second Circuit

this 11th day of April, A. D. 1977

Lee Brashears

Subscribed and sworn to before me this 11th

day of April, A. D. 1977.

Rose marie Kremske

Notary Public.

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